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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 388

AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 1267,
Petitioner,

vs.

DADE COUNTY, a political subdivision of the State of Florida, and the METROPOLITAN DADE COUNTY TRANSIT AUTHORITY, a governmental entity of Dade County, Florida,
Respondents.

(On Petition for Writ of Certiorari to the Supreme Court of the State of Florida)

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The order of the Supreme Court of Florida sought to be reviewed is reported by memorandum decision at 166 So.2d 149. Such order dismissed for want of jurisdiction an appeal taken by the petitioner herein to review the

decision of the District Court of Appeal of Florida, Third District, reported at 157 So.2d 176. The decision of the District Court of Appeal affirmed in part, reversed in part, and remanded for further proceedings a final decree and opinion of the Trial Court (Circuit Court of Dade County, Florida) reported at 19 Fla. Supp. 69.

Connected cases dealing with this same controversy are reported in *Division 1267, Amalgamated Association, etc.*, v. *Ordman*, 320 F.2d 729 (1963); *State of Florida* v. *Dade County*, 142 So.2d 79 (Fla. 1962); and *Hardy* v. *O'Grady*, 159 So.2d 908 (D.C.A. 3d Fla. 1964).

JURISDICTION

The jurisdiction of this Court ostensibly is invoked under the provisions of 28 U.S.C., Section 1257, to review a state court decision that construed and applied state law in determining the status, relationship and rights of the parties under contract documents providing for the purchase of a bus transportation system by Dade County, a political subdivision of the State of Florida. The state court disagreed with petitioner's contention that the Labor Management Relations Act prohibits the state court from exercising jurisdiction in respect to the subject matter of this controversy. Petitioner's contention apparently is predicated upon the conclusion that a proper interpretation of the contract documents involved indicates that the County is not actually the owner of the bus transportation system, because the former private owner maintains a substantial financial or operating control of the transit facilities, and therefore, the exemption of states or political subdivisions thereof from coverage of the Labor Management Relations Act is not applicable to Dade County, Florida.

QUESTIONS PRESENTED

1. Whether the several contract documents governing the purchase of a bus transportation system by Dade County, a political subdivision of the State of Florida, may be reasonably construed to vest in the former private owner such control as to make the County and its employees arguably subject to coverage of the National Labor Relations Act.

2. Whether a state court is deprived of jurisdiction to construe and apply state law in a controversy involving the right of a labor union to bargain collectively with and strike against a county government, where the General Counsel of the National Labor Relations Board, after full investigation and study, rules that "the County is the employer of the employees who are or will be engaged in the operation of the transferred transit system; that the statutory exemption in Section 2 (2) of the National Labor Relations Act is applicable; and that the sale and purchase arrangements between Pawley and Dade County do not require a different conclusion"; and recognizes the state court litigation; and where the federal court upheld the action of the General Counsel.

STATUTES INVOLVED

Relevant provisions of the Labor Management Relations Act are set out in the appendix to the petition for writ of certiorari. Section 839.221, Florida Statute 1959, which was construed and applied by the state court, is as follows:

> "839.221 *Governmental officers and employees; prohibited participation in strikes or membership in*

organizations that assert right to strike against government employer.—

(1) No person shall accept or hold any office, commission or employment in the service of the state, of any county or of any municipality, who:

(a) Participates in any strike or asserts the right to strike against the state, county or any municipality; or

(b) Is a member of an organization of government employees that asserts the right to strike against the state, county or any municipality, knowing that such organization asserts such right.

(2) All employees who comply with the provisions of this section are assured the right and freedom of association, self-organization, and the right to join or to continue as members of any employee or labor organization which complies with this section, and shall have the right to present proposals relative to salaries and other conditions of employment through representatives of their own choosing. No such employee shall be discharged or discriminated against because of his exercise of such right, nor shall any person or group of persons, directly or indirectly, by intimidation or coercion, compel or attempt to compel any such employee to join or refrain from joining a vocational or a labor organization.

(3) In the event that any public utility owned and operated by a private person, firm or corporation is taken over on or after May 1, 1959, by the state, a county or a municipality but in fact said person, firm or corporation maintains a substantial financial or operating control, said persons then employed or to be employed shall be excluded from the operation of this section.

(4) Upon the acquisition of any public utility system from a private person, firm or corporation by

any state, county or municipal government, then and in that event the employees of such private person, firm or corporation other than executive or management staff, shall be eligible to be included in classified civil service and other benefit provisions and systems of that governmental unit."

STATEMENT

This litigation necessarily involves review and interpretation of the contract documents and written instruments evidencing the transaction under which Dade County, Florida, purchased and presently operates a unified bus transportation system for the benefit and convenience of its residents and tourists. This is so, because the contract documents provide the only sound basis for determining whether or not there is any real substance to the petitioner's contention that this transaction does not constitute a county-owned and operated transit system whose labor relations are by definition expressly excluded from the coverage of the National Labor Relations Act. Accordingly, the controlling provisions of the contract documents heretofore considered and construed by the state and federal courts and the General Counsel of the National Labor Relations Board are summarized hereinafter. In the absence of availability of a printed record, references are to the Joint Appendix utilized in the state court, referred to in the petition for writ of certiorari at page 4.

A. The Sale and Purchase Transaction.

1. County Ordinance Creating the Metropolitan Dade County Transit Authority.

On August 2, 1960, the Board of County Commissioners of Dade County, Florida, under its home rule powers en-

acted Ordinance 60-21 announcing its determination to establish "a comprehensive, unified mass transit system in Dade County * * * for the convenience, benefit and welfare of * * * its citizens" (J.A. 24). The ordinance refers to "the unique and troublesome economic problems attendant upon * * * operation" of an efficient private transit system in a county area made up of "numerous separate municipal corporations and unincorporated populated areas * * * [with] overlapping and divided regulatory agencies * * *" and expresses a legislative intent to "provide for the appropriate purchase, acquisition, development, operation, and maintenance of an adequate unified mass transit system by the County upon a self-liquidating and self-sustaining basis" (J.A. 25). To carry out this intent, the ordinance provides for the establishment of a "Metropolitan Dade County Transit Authority" consisting of five members appointed by the Board of County Commissioners with authority to operate and maintain all transit systems acquired by the County "under the direct supervision and control" of the County Commissioners and "subject to the policies established by [them]" (J.A. 37). Specifically, the Transit Authority is authorized to investigate and make recommendations concerning the acquisition and financing of any transit systems, to fix or modify rates or other charges for the use of any transit facilities acquired by the County, and to make rules and regulations concerning the operation and maintenance of the system, subject to the covenants in any outstanding revenue bond indentures and the requirement that the Transit Authority "shall always provide rates * * * adequate in amount to produce sufficient revenue to maintain the transit system on a self-sustaining basis" (J.A. 31-36).

The ordinance further provides that "no County tax funds shall be expended by or for the Authority"; that "all

revenues derived * * * from the operation of any transit system * * * shall be deposited in appropriate special trust fund accounts in the name of the County," to be disbursed "by means of County warrant issued by the County Finance Director"; and that "no such funds shall be utilized for any purpose other than for the acquisition, operation, maintenance, or improvement of transit systems owned by the County" (J.A. 33-34). Finally, the ordinance provides that "whenever the County acquires existing transit systems * * * to the extent necessary or feasible for the economical operation of such facilities, all of the employees of such acquired transit system whose duties pertain to the facilities acquired shall be employed in comparable positions in the County service, [that their] * * * pay status, seniority, vacation and sick leave rights shall be preserved and maintained to the fullest possible extent, [and that] all employees of the Authority shall be deemed * * * County employees and shall be entitled to all the rights, privileges and benefits" attendant on County employment (J.A. 35).

2. Feasibility Report of Consulting Engineers.

On March 17, 1961, and September 29, 1961, a firm of consulting engineers, Coverdale & Colpitts, issued reports requested by the Transit Authority on the projected acquisition and unified operation by the County of four transit companies owned by W. D. Pawley. These reports predicted profitable county operation, foreseeing savings on injury and damage claims, operating taxes, and other expenses that would offset an anticipated increase in wage costs. In addition, construction of a centralized garage was planned, which would save approximately $145,000 a year. Other advantages, such as "free interchange of personnel and equipment," were anticipated through centralized county operation. Purchase of the remaining

three bus lines in the County from their owners was also apparently contemplated.

3. Agreement for the Sale and Purchase of Transit System.

On May 17, 1961, the County, acting upon the recommendation of the Transit Authority, entered into a contract with Pawley for the purchase of his four companies (J.A. 38-54). Under the terms of this agreement, the County agreed to purchase all of Pawley's shares in these companies for $7,705,274, minus the liabilities outstanding at the hour of closing (the companies' liabilities totalled $2,839,961.90 as of March 31, 1961). Pawley was to be paid $300,000 of this amount in cash from the proceeds of the sale of certain transit properties not needed for the County's operations. The rest of the net purchase price was to be paid Pawley in county revenue bearing interest at a rate not exceeding 5 percent per year. After judicial validation, Pawley was to receive bonds in the aggregate principal amount of the net purchase price, minus the $300,000 that was to be paid him in cash. The remaining bonds were to be sold for cash on the open market. The proceeds from the sale of these bonds were to be used to construct a central garage and to supply capital with which to begin operations.

Thus, under the terms of the sale and purchase agreement the $9,000,000 Dade County Transit Revenue Bonds were to be disposed of in the following manner:

Total Bond Issue			$9,000,000.00
Agreed Purchase Price		$7,705,274.00	
Less Liabilities	$2,839,961.90		
Less Cash Payment	300,000.00		
	$3,139,961.90	3,139,961.90	
Bonds to be delivered to Pawley for net purchase price		$4,565,312.10	4,565,312.90
Bonds to be sold on market			$4,434,687.90

The purchase agreement also provided that none of these bonds should mature later than 15 years from the date of the purchase agreement, that the principal and interest on the bonds should be payable solely from operation of the transit system, and that the bonds should be issued under a mutually satisfactory trust indenture.

4. Trust Agreement.

On October 1, 1961, the County executed a trust indenture with the Bankers Trust Company and the Miami Beach First National Bank as trustee and co-trustee, respectively (J.A. 184-198). The trust agreement provides that Special Revenue Transit Bonds shall issue under, and be secured by, it in the aggregate principal amount of $9,000,000 to mature serially in the 15 years between 1962 and 1977, with the face value of the bonds scheduled to mature each year increasing as the interest due on the outstanding bonds diminishes. Thus, in 1963, bonds are to mature in the principal amount $415,000, with the interest due that year totalling up to $450,000 (5 percent of $9,000,000); while in 1977, the last of the bonds are to mature in the principal amount of $825,000, with the interest due that year totalling no more than $41,250 (5 percent of $825,000). Additional bonds may be issued under the provisions of the trust agreement for improvement of the transit system or refunding of the debt if such issuance is specifically authorized by county ordinance.

The bonds are to be held in trust pending their validation and the filing of documents evidencing the meeting of certain conditions precedent to the satisfaction of the County Attorney or the Clerk of the Board of County Commissioners. Thereafter, the trustee is to deliver the bonds to Pawley and the bond purchasers in the manner provided in the purchase agreement.

The trust agreement provides that the trustee shall deposit specified portions of the premium proceeds of the bond sales with the co-trustee to the credit of a Dade County Transit System "Operating Fund," "Construction Fund," and "Equipment Reserve Fund". Any balance is to be deposited to the credit of a Dade County Transit System "Improvement Fund".

Thereafter, funds derived from county operation of the transit system are to be deposited with the co-trustee to the credit of a Dade County Transit System "Revenue Fund". The co-trustee is to channel sums from this fund in to the other transit system funds in accordance with the provisions of the trust agreement and the current county budget, and pursuant to authorization by the Finance Director of Dade County, the superintendent of the transit system, the Chairman and Vice-Chairman of the Board of County Commissioners, and the consulting engineers. Moneys are to be paid out of these funds upon requisitions signed by the County Finance Director and the transit superintendent.

The trustees may be removed under the trust agreement by a vote of a majority of the bondholders or for breach of duty, by any court of competent jurisdiction upon the application of the Board of County Commissioners or the holders of not less than 5 percent in aggregate principal amount of the bonds. New trustees, whose qualifications meet the requirements of the trust agreement, may be named by the Board of County Commissioners or by a majority of the bondholders, with the latter's choice taking precedence.

The trust agreement also establishes certain guarantees for the economic and efficient running of the transit system until the bonds have been paid off by revenues derived

from its operation. For example, the County covenants that it will provide free transportation only in certain limited situations, that "the Current Expenses incurred by the Transit Authority in any fiscal year will not exceed the reasonable and necessary amount thereof, and that the County will not incur any obligations for maintenance repair and operation in excess of the amounts provided for current expenses in the appropriate [county] budget". The County further covenants that "the Transit Authority will establish and enforce reasonable rules and regulations governing the use of the Transit System and the operation thereof, that all compensation, salaries, fees and wages paid by the Transit Authority in connection with the * * * operation of the Transit System will be reasonable, that no more persons will be employed * * * than are necessary for the efficient and economical operation of the Transit System, that it will maintain and operate the Transit System in an efficient and economical manner * * * and that, from the Revenues thereof, it will at all times maintain the same in good repair and in sound operating condition * * *".

In addition, the County covenants that the Transit Authority will employ as consulting engineers, under the trust agreement "an independent engineer or engineering firm or corporation having a nationwide and favorable repute for skill and experience in such work" and that it will secure the written approval of the trustee before employing anyone other than Coverdale & Colpitts in this capacity. Certain functions of the consulting engineers under the agreement are advisory, designed to aid, but not restrict, the Transit Authority in establishing sound fiscal and operational policies for the transit system. Thus, the consulting engineers are to submit a report to the Transit Authority at least once a year setting forth findings on the condition, repair, and operation of the properties of the

transit system and their recommendations for the ensuing fiscal year, on: (1) the proper maintenance, repair and operation of the system; (2) the appropriations which should be made for such purposes; (3) the insurance to be carried under the trust agreement; (4) the amounts to be deposited in the Damage Reserve Account, the Equipment Reserve Fund, and the Renewal and Replacement Fund; and (5) any "necessary or advisable revisions of the rates, fares and charges". In return, the County covenants to keep the consulting engineer (as well as the bondholders and trustees) apprised of the current operations of the transit system by means of monthly audits and reports.

Particular aspects of the County's operation of the transit system that could adversely affect the security of the bondholders' investment are subject to the approval of the consulting engineers. For example, the County covenants that the Transit Authority "will maintain a practical insurance program, with reasonable terms, conditions, provisions and costs, which the Transit Authority determines, with the approval of the Consulting Engineers, will afford adequate protection against loss caused by damage to or destruction of the Transit System". Similarly, the County covenants neither to alienate any transit properties nor to permit the Transit Authority to do so, unless it determines, with the approval of the consulting engineers, that the articles to be sold are no longer necessary or useful to the operation. The plans and specifications adopted by the County for the construction of a central transit system garage are also to be approved by the consulting engineers.

With respect to the transit system rates, the County covenants that, in beginning operations, it will place in effect the rates presently being charged by the companies

or such other rates "which the Consulting Engineers shall have certified will not in their opinion produce less Net Revenues than those estimated in their report * * * [of September 29, 1961]." Thereafter, the County covenants to make such rate adjustments "as may be necessary or proper" to produce sufficient revenues to meet its maintenance and expense requirements, its current expenses, and its bond retirement and interest commitments; but not to "revise any schedules of rates and charges until after receiving the recommendations of the Consulting Engineers".

The County may refuse to institute rate increases recommended by the consulting engineers or may institute increases that are not recommended. It is encouraged to follow the rate recommendations of the consulting engineers, however, by a provision in the trust agreement that excuses any default in bond payments, provided these recommendations have been followed. On the other hand, even though the consulting engineers have approved the rates charged, if they are not sufficient to meet the requirements of the operation as specified in the trust agreement, the holders of not less than 5 percent in aggregate principal amount of the bonds then outstanding may institute an action in a court of competent jurisdiction to compel the Transit Authority to revise the rates in accordance with these requirements.

Additional remedies are provided in the trust agreement for the breaching of the covenants incorporated in the agreement. Thus, upon the occurrence and continuance of any one of a specified list of unexcused instances of default, the trustee "may, and upon the written request of the holders of not less than 20 percent in aggregate principal amount of the bonds then outstanding shall, by notice in writing to the County, declare the principal of all the

bonds then outstanding to be immediately due and payable." Further, upon the occurrence and continuance of such a default, the trustee may, and upon the written request of the holders of not less than 10 percent in aggregate principal amount of the bonds then outstanding shall, proceed to protect and enforce its rights and the rights of the bondholders by such "suits, actions or special proceedings in equity or at law, either for the specific performance of any covenant or agreement contained herein or in aid or execution of any proper legal or equitable remedy, as the trustee, being advised by counsel, shall deem most effectual to protect and enforce such rights."

The trust agreement also provides for the County's employment of a "management agency," specifying the National City Management Company for the job, initially.

5. Management Services Contract.

On July 25, 1961, the Transit Authority entered into a contract with National City Management "to furnish all professional services reasonably required by the Authority for the management and supervision of all public passenger transportation systems and facilities under * * * [its jurisdiction]" (J.A. 64-75). The management agency is to prepare annual operating budgets for the transit system, subject to the review of the Transit Authority and the Board of County Commissioners, and to make appropriate recommendations "relative to any changes in routes, schedules, and fares desirable for more efficient and economical operation of such public transportation systems and facilities".

Under this agreement, the management agency is to provide the supervisory personnel to regulate the "day-to-day" operations of the transit system on behalf of the County, supplying the "technical know-how" with re-

spect to running such an operation that the County lacks. For example, the management agency is to set bus routes and schedules, assign drivers to their runs, keep attendance records, and establish equipment maintenance and repair procedures. On the other hand, the County Personnel Department, and not the management agency, is to handle all matters connected with the hiring of the transit system's employees, including the taking of job applications, the giving of competitive examinations, and the establishment of hiring standards. In addition, the County Personnel Department has authority to fire, promote, or discipline employees and to set the general labor policies that the management agency is to administer.

6. Working Rules and Regulations Governing County Transit Employees.

During October, 1961, the County and the Transit Authority adopted and distributed "Working Rules and Regulations" for the employees of the transit system, which were alleged to follow as closely as possible, consistent with county employment requirements, the contract terms negotiated by the Union and the companies, including the pay scales there established. These Working Rules provide that the employees of the Transit Authority shall be county employees, entitled to all the rights, privileges, and benefits of the classified service, with certain exceptions not relevant here; that employees may belong to associations or unions that do not assert a right to strike against the County or "to force collective bargaining procedure"; and that employees or their representatives may participate in hearings before the Association prior to periodic revisions of "the rules and regulations relating to the working conditions of employees of the Authority". The rules further provide that whenever practical, promotional positions

will be filled by competitive examinations under the personnel rules for the classified service set out in the Code of Metropolitan Dade County.

7. Agreement for Delivery of Possession of Transit System.

On November 7, 1961, Dade County and Pawley entered into an agreement supplementing the agreement for sale and purchase (May 17, 1961), wherein the County was granted the option, at its discretion, to take possession of the transit system at any time prior to payment of the purchase price, upon certain conditions. Such supplemental agreement expressly provided as follows:

> "2. COUNTY OWNERSHIP. Upon delivery of possession in accordance with the provisions of paragraph 1 of this Agreement, the County shall become the full, absolute and sole owner and operator of said transit system, and W. D. Pawley shall not thereafter have or exercise any financial or operating control over said transit system. The sole rights of W. D. Pawley in respect to said transit system shall consist of the right to receive revenue bonds in payment of the purchase price for said transit system as fixed and determined by the existing agreements between the parties, as modified by this agreement, at the time of closing."

B. Proceedings Below in State Courts.

On November 21, 1961, the Board of County Commissioners of Dade County, Florida, adopted Resolution No. 7120, entitled as follows:

> "Resolution Directing County Attorney To Institute Appropriate Litigation Seeking To Settle By Judicial Determination Questions Of Law And Matters Of Controversy Created By Union's Demand For A Collective Bargaining Agreement In Connection With Dade County's Operation Of Unified Transit System"

The pertinent provisions of the Resolution are as follows:

"WHEREAS, the Amalgamated Association of Street Electric Railway and Motor Coach Employees of America, Division 1267, demands that the County recognize such Union as the sole and exclusive bargaining representative or agent for all transit employees, and that the County enter into a collective bargaining agreement with such Union covering wages, hours, working conditions and all other matters of employment; and the County has good reason to believe that, if the County undertakes to take possession and operate said transit systems without complying with the demands made by the Union, the Union will cause a strike, walkout, or work stoppage of the transit employees; and

WHEREAS, the County is informed and believes that it cannot lawfully recognize the Union as the exclusive bargaining agent for the transit employees, or make the wages, hours, and working conditions of County employees the subject matter of a collective bargaining agreement with the Union. The Union contends that the County can lawfully comply with its demands; and

WHEREAS, it is essential in the public interest that the questions of law and matters of controversy raised by the Union's demands be settled in an orderly manner by judicial determination prior to the County taking possession of and operating said transit system in order to alleviate the possibility of a stoppage of the running of busses and the economic loss and damage that such stoppage would impose upon this community,

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF DADE COUNTY, FLORIDA, that the County Attorney is hereby authorized and directed to institute appropriate litigation designed to obtain a judicial determination of the questions of law and matters of controversy raised by the Union in respect to the rights, duties

and liabilities of the County concerning the recognition of the Union as the bargaining agent for all transit employees and the demand by the Union that the County enter into a collective bargaining agreement."

On November 30, 1961, the County and the Transit Authority filed in the Circuit Court of Dade County a suit against the Union and its representatives alleging that a strike of the transit system drivers was imminent and praying for a declaratory judgment whether the County and the Transit Authority could lawfully grant exclusive recognition to the Union or enter into a collective bargaining agreement with it (J.A. 1-19). The Union and its representatives resisted this action on the ground that the employees' rights were established in the National Labor Relations Act and that state action in this field was, therefore, preempted by federal law (J.A. 102-128). The plaintiffs answered this contention by urging that the County and Transit Authority were excluded from the statutory definition of employer by Section 2 (2) of the National Labor Relations Act.

The Circuit Court held that, in view of the exemption in Section 2 (2) of the National Labor Relations Act, federal law did not preclude the State from determining whether the Union could strike against the County or whether the County could grant exclusive recognition to, or enter into a collective bargaining agreement with, the Union (J.A. 199-220). Under state law, the court held that collective bargaining agreements with the County and strikes against it are prohibited, absent specific legislative authorization. The court declined to find such authorization in the section of the Florida Statutes cited to it by the Union. It noted, however, that the state provision cited recognized federal primacy over labor disputes between private employers and their employees. The court, accordingly, left

to a "federal tribunal" the question whether the private management agency, when it actually assumed its contract functions following county takeover of the transit system, would exercise such controls over the employees as to constitute it "an employer [under the National Labor Relations Act] or, at least, jointly so with the government" and hence subject to the obligations which that Act places on private, as distinguished from governmental employers.

On January 15, 1962, the Chairman of the Transit Authority wrote to the employees of the transit companies, reciting that the Circuit Court's decision had clearly established "that the County Government could not lawfully enter into a collective bargaining agreement, nor * * * recognize any strike directed against the County Government". The letter offered the employees county employment, following takeover of the transit system, "under the same conditions of employment with respect to wages, hours, working rules, and seniority, as you now have" and stated that the employees would retain "accrued vacation, sick leave, and insurance" and would be entitled to "the rights, privileges and benefits of County employees". Enclosed in the letter was an application form for county employment and a notice of employment status. The letter concluded, "if such forms are not returned it will be assumed that you do not wish to work for Dade County * * * and the County will have no alternative but to fill * * * [your] position".

On February 9, 1962, the County took possession of the transit system pursuant to the Agreement for Delivery of Possession which provided that the County might take title to all the shares in the transit companies, together with all assets, property, and equipment, and might begin immediate operation of the system even though the revenue bonds had not yet been validated, sold, and delivered.

The agreement provides further: "It is understood that the County will immediately liquidate said transit companies so that title to the assets owned by such corporations shall become vested in the County". The resident supervisory personnel whom the management agency had agreed to supply for the operation went on the County's payroll on the County's assumption of possession.

On March 2, 1962, the Union filed notice of appeal from the Circuit Court's decision to the Supreme Court of Florida, alleging that the decision involved a question of construction of "a controlling provision of the * * * Federal Constitution" and urging the Court to dismiss the suit instanter because "under the preemption doctrine a state court is not empowered to adjudicate the novel and substantial question of National Act coverage posed on the facts of this case". The County and Transit Authority appealed from the Circuit Court's additional ruling that Pawley retained "substantial financial or operational control" of the transit system following its transfer and that, therefore, the transit employees would not be eligible under the Florida Statutes "to be included in [the] classified civil service."

On June 8, 1962, the Supreme Court of Florida entered a decision in a proceeding in which the Union had participated, validating the transit revenue bonds. *State* v. *Dade County, Florida*, 142 So.2d 79, 84. The court held, inter alia, that "the County has power to purchase and operate a unified county-wide transportation system * * *." 142 So.2d at 86. In disposing of the contention that the County's purchase of all the stock in Pawley's companies violated a state constitutional prohibition against the County's becoming a stockholder in any corporation, the court held that this prohibition extended only to the County's "becoming a stockholder with others * * *." 142

So.2d at 88. In the instant purchase and sale agreement, the court noted that the County takes title to all the common stock "for the purpose of acquiring said companies in their entirety including all of their assets, and that promptly upon the closing of the transaction the companies will be dissolved and the County will th n become the owner of the transportation system and all of its physical properties". 142 So.2d at 88.

Finally, the court held that the provisions of the purchase agreement and the rates to be charged by the transit system are not subject to review by the Florida Railroad and Public Utilities Commission because the legislature did not intend that the Commission should have "jurisdiction over publicly owned and operated transportation systems." 142 So.2d at 89.

On November 1, 1963, the District Court of Appeal of Florida, Third District, rendered its decision on the appeals taken by both parties from the final decree and opinion of the Circuit Court of Dade County. The District Court of Appeal held that the state courts had jurisdiction to entertain thi litigation; that Florida law barred the County fro n bargaining collectively with a labor union and immunized the County against strikes by County employees; that members of the union who accepted employment as County employees were entitled to the benefits of civil service; and that although Pawley has a substantial financial or operating control (within the meaning of Section 839.221, Florida Statutes) as an owner of revenue bonds issued by the County to pay the purchase price for the transit system, he does not have ultimate control over the transit system. *Dade County* v. *Amalgamated Association, etc.*, 157 So.2d 176 (Fla. 1963).

The Union took an appeal to the Supreme Court of Florida from the decision of the District Court of Appeal,

contending federal preemption and violation of the supremacy clause. The Florida Supreme Court dismissed the appeal. 166 So.2d 149.

The petition for writ of certiorari herein seeks a review of these decisions of the Florida Courts.

C. Federal Court Proceedings.

While the foregoing proceedings were pending in the state courts, the Union filed charges of unfair labor practices against the County with the National Labor Relations Board. The initial charges alleged, inter alia, "a plan, agreement and conspiracy" to transfer from Pawley to Dade County "the status and powers of 'employer' of bus employees while Pawley retains beneficial ownership and substantial control of the bus system, intending thereby to divest bus employees and the Union of their federal statutory right to bargain collectively."

On February 13, 1962, the Union filed a second amended charge with the Board alleging that W. D. Pawley had "discriminatorily locked out and discharged all employees of * * * [the transit companies] * * * by transferring to Dade County and Dade County Transit Authority the role of employer with knowledge that they would condition offers of employment upon relinquishment or abandonment of the right to bargain collectively and to strike * * *". The charge further alleged that Dade County and the Transit Authority had "discriminatorily denied said locked out and discharged employees opportunity to accept employment by conditioning job offers to them upon relinquishment or abandonment of the right to bargain collectively and to strike" and that by this conduct "Pawley, Dade County and the Dade County Transit Authority [had] additionally violated Section 8 (a) (1), (3), and (5) of the Act".

On March 2, 1962, the Regional Director of the Board for the Twelfth Region wrote a letter to all parties concerned, stating that it had been decided not to issue a complaint based on appellant's unfair labor practice charges because, following investigation and study, it had been concluded that "in the present posture of the case the County is the employer * * *; that the statutory exemption in Section 2 (2) of the National Labor Relations Act is applicable; and that the sale and purchase arrangements between Pawley and Dade County do not require a different conclusion." The letter added:

> "However, as you know, there is presently pending litigation in the Florida State Court between the parties which also raises questions as to the status of the transit line employees and their right to engage in collective bargaining and to strike over terms and conditions of employment, under state law. The outcome of this litigation may conceivably have an impact on the unfair labor practice charge filed by the Amalgamated. For that reason, and in order to permit a re-examination of the charge in the light of the final outcome of the State Court litigation and to avoid prejudicing the rights of the charging parties under the National Labor Relations Act's 6-month statute of limitations, the charge will not be dismissed at this time."

On June 21, 1962, the General Counsel affirmed this ruling.

On November 7, 1962, the petitioner instituted suit in the United States District Court against the General Counsel, seeking a judgment that Dade County was not exempt from the prohibitions imposed by Section 8 of the National Labor Relations Act. The District Court dismissed the suit. On appeal, the United States Court of Appeal affirmed. See *Division 1267, Amalgamated Association, etc.*, v. *Ordman*, 116 U.S. App. D.C. 7, 320 F.2d 729 (1963).

SUMMARY OF ARGUMENT

The only substantial question in this case is whether Dade County, a political subdivision of the State of Florida, and its employees are arguably subject to the coverage of the Labor Management Relations Act (notwithstanding the express exclusion granted by Section 152(2)(3) of the Act to states or political subdivisions thereof and their employees), by reason of the fact that Dade County purchased a private bus transportation system by means of revenue bonds payable solely from net revenues derived from County operation and guaranteed to all bondholders by a customary revenue bond trust indenture that the revenue facility (transit system) will be operated by the County in a sound, efficient and business-like manner until the revenue bonds are fully paid.

The state courts, federal courts, and the National Labor Relations Board properly concluded that, under the contract documents governing this transaction, the County is the employer and the statutory exemption in Section 2 (2) of the Labor Management Relations Act is applicable, and therefore, state law governs the labor relations between the County and its employees.

This determination is in full accord with Section 2 (2) of the Act and with the court decisions interpreting that provision. The controlling decisions offer no support whatever for petitioner's contention that government "divests" itself of the statutory exemption by entering into a transaction of this particular nature with private interests. In no case in the history of the Act has an unfair labor practice order been issued against a governmental entity, on the basis of petitioner's "divestiture" theory—or, indeed, on any theory at all. On the contrary, the precedents evi-

dence a consistent concern with whether government or private interests control the employer-employee relationship, predicated on the premise that governmental employers, as such, are never subject to regulation by the National Labor Relations Board.

To be sure, if the County had simply purchased some shares in the private companies, it would not thereby invest those companies with its own statutory immunity. The Florida Constitution (Article IX, Section 10) expressly prohibits the state or a political subdivision thereof from becoming a joint owner or stockholder in any company, or lending its credit or other incident of sovereignty to any company, corporation or association. See *State of Florida* v. *Dade County,* 142 So.2d 79, 88. But that is not the situation presented here; for it is the County that possesses the employer controls; it is the County that hold title to all the transit system assets; it is the County that petitioner seeks to reach with its unfair labor practice charges; and it is the County that is specifically exempted under Section 2 (2) of the Act.

The covenants of sound and efficient operation included in the trust agreement do not warrant a different result. Such covenants are common features of revenue bond indentures and are perfectly consistent with the County's possession of the employer controls, ownership of the transit assets, and right to the statutory exemption. Petitioner's further contention that the County's purchase of the transit system was part of an elaborate scheme to lend the County's statutory immunity to Pawley's companies has no support in the record. Clearly, from the County's point of view, the purpose of the transaction was to acquire a transit system. The fact that the parties were aware of the statutory exemption for governmental employers and that they probably regarded it as one of the advantages of county opera-

tion and ownership does not make the realization of these advantages improper. Nor did it transform the purchase and sale of the transit system into a "conspiracy * * * to divest bus employees and the Union of their federal statutory right to bargain collectively," as petitioner alleges.

The employer-employee relationship is the controlling factor in labor relations. It is undisputed in this case that the employees involved are County employees in every sense. They are paid by the County. They may be discharged only in accordance with civil service regulations promulgated by the County. Their wages and working conditions are established by rules and regulations adopted by the County. Neither the bondholders, the former owner, or anyone else has any control whatever over these employees, except the County. They occupy exactly the same status as all other employees of the County government. As government employees, they are inhibited by state law and state policy from bargaining collectively and striking against the government. It is noteworthy that 5 U.S.C. 118 prohibits the employment of federal employees knowingly members of an organization asserting the right to strike. *Section 839.221, Florida Statutes*, contains the same restriction; however, it is provided that where a privately owned utility is "taken over" by the state, a county, or a municipality, and the former owner "maintains a substantial financial or operating control" the employees may become governmental employees even though they knowingly belong to an organization asserting the right to strike against the government. This permits the Union members to accept employment by the government, if it is determined that the condition of "substantial financial or operating control" exists. The state courts simply found that Pawley maintains a "substantial financial or operating control" in the transit system purchased by the County—within the

meaning of the Florida Statute. Thus, the Union members were not deprived of the privilege of becoming employees of the County and maintaining exactly the same status they occupied under private ownership (except the right to strike and bargain collectively). However, the state courts, and the National Labor Relations Board, concluded that the County, as the "employer"—within the meaning of Section 2 (2) of the Labor Management Relations Act—was vested with the ultimate control of the transit system and the employees.

This case presents no unique or unusual situation. Courts of other states have uniformly upheld state statutes prohibiting strikes against governmental agencies where constitutional questions and federal preemption were raised. *City of Detroit* v. *Division 26 of Amalgamated Association, etc.*, 332 Mich. 237, 51 N.W.2d 228, appeal dismissed 344 U.S. 805, 73 S. Ct. 37, 97 L. Ed. 627; *International Longshoremen's Association* v. *Georgia Ports Authority*, 217 Ga. 712, 124 S.E.2d 733, cert. denied 370 U.S. 922 (1962); *South Atlantic and Gulf Coast District of International Longshoremen's Association* v. *Harris County, etc.*, 358 S.W. 2d 658 (Tex.), cert. denied 372 U.S. 975; and *State* v. *Brotherhood of Railway Trainmen*, 37 Cal. 2d 412, 232 P.2d 857, cert. denied 342 U.S. 776. See also *Rhyne, Labor Unions and Municipal Employee Law* (NIMLO, 1946).

The real motivation for this controversy engendered by petitioner is its deep seated opposition to any acquisition of transportation facilities by government. See *State of Florida* v. *Dade County*, 142 So.2d 79, 89. By supplemental petition, the petitioner urges this Court to exercise jurisdiction to put a stop to the widespread trend of government acquiring revenue producing facilities without pledging the general taxing powers.

The merits of the public policy in favor of government acquisition of revenue producing facilities for the common benefit of the public, and of permitting governments to control the organizational rights of their own employees, are, of course, not in issue here, in view of the express exemption in Section 2 (2) of the Labor Management Relations Act. The question is simply whether the state courts, the federal courts, and the National Labor Relations Board correctly construed the contract documents here involved as not making this transaction arguably subject to the provisions of the Labor Management Relations Act.

ARGUMENT

This is not a situation where the General Counsel of the National Labor Relations Board has declined to act. The General Counsel, after full investigation and study of the transaction, affirmatively concluded that:

> ". . . The County is the employer of the employees who are or will be engaged in the operation of the transferred transit lines; that the statutory exemption in Section 2 (2) of the National Labor Relations Act is applicable; and that the sale and purchase arrangements between Pawley and Dade County do not require a different conclusion."

Moreover, the General Counsel recognized the pending litigation in the state court, and deferred to the exercise of jurisdiction by the state court.

The conclusions and actions of the General Counsel were reviewed and upheld by the United States District Court and the United States Court of Appeals. *Division 1267, Amalgamated Association, etc.*, v. *Ordman*, 320 F.2d 729 (1963).

It is recognized that the conclusions of the General Counsel are not conclusive as to the issue of whether Dade County is arguably subject to the coverage of the National Labor Relations Act, but it is respectfully submitted the adjudications made by the General Counsel, the federal courts and the state courts to the effect that the contract documents evidencing this transaction do not justify a conclusion other than the applicability of Section 2 (2) of the Act should have a material bearing on the propriety of this Court to exercise its discretion. At least, it serves to support the correctness of the state decision sought to be reversed.

The National Labor Relations Act does not purport to regulate labor relations between subdivisions of a state and its employees. The states and their employees are by definition expressly excluded from the coverage of the Act. In this case, all the employees utilized in connection with the operation of the transit system are absolutely and completely under the full control of the government. No private interests have anything whatever to do with any of the activities of these employees. They occupy exactly the same status as other County employees. The "substantial financial or operating control" of the bondholders relates solely to the financial operations of the transit system, and not to the activities of the employees. Thus, the principle enunciated in *Motor Coach Employees* v. *Missouri*, 374 U.S. 74 (1963), is not applicable.

The petitioner's charges that the County engaged in a conspiracy to deprive the transit employees of their rights are disproved by the circumstances set forth in *Hardy* v. *O'Grady*, 159 So.2d 908 (3rd D.C.A. Fla. 1964). The Board of County Commissioners undertook to provide that only members of the petitioner union shall be eligible for employment by the County in connection with the op-

eration of the transit system. The court held that the Union members were entitled to exactly the same rights and privileges as others.

Section 8 (a) of the Act, on which petitioner predicated its unfair labor practice charges in the instant case, prohibits certain actions by "an employer." Section 2 (2) provides:

> "The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof * * *".

In the instant case, the County and its Transit Authority possess the relevant controls with respect to the transit employees. They control the hiring, firing, promoting, and disciplining of these employees; they set the wage rates and labor policies. Of the four private interests involved in the transaction, three (the bondholders, the trustees, and the consulting engineers) have only the most incidental contact with the transit system's employees, for their rights and duties under the various contract arrangements relate only to insuring payment of the bond debt from the transit system's revenues. The fourth private interest, the management agency, has a somewhat more substantial contact with the transit drivers, but its relationship still falls far short of that of employer to employees. Thus, the management company will set bus routes, assign drivers, keep attendance records, and establish procedures for regular maintenance and repair of the transit system's equipment, supplying the technical "know-how" for the operation that the County lacks. But, so far as labor relations are concerned, the management company's employees are simply to implement policies established

by the County and the Transit Authority in much the same way that any supervisory employee carries out the policies of his employer. Petitioner relies on the County's covenant in the trust agreement not to pay higher wages than are reasonable and not to employ more men than are necessary, as part of its general undertaking to run the transit system economically and efficiently. This covenant obviously does not vest the trustees and the bondholders with the kind of controls that would constitute them employers under the Act. If the situations were reversed, with the private parties retaining the employer controls, subject to certain general covenants and controls operating in favor of the County, only the private parties, and not the County, would come under the Act's coverage as employers. See *R.F.C.* v. *Merryfield*, 134 F.2d 988, 991-992 (C.A. 1).

Petitioner acknowledges that the County, as the employer here would ordinarily be entitled to governmental immunity under Section 2 (2) of the Act, but contends that it has "divested" itself of this immunity by entering into a "joint venture" with private interests. In support of this contention, petitioner cites a number of cases which, unlike the instant one, do not involve a claim of sovereign privilege or exemption by a governmental entity itself, but rather turn on whether corporations in which government participates as a shareholder are to be regarded as an arm of the state by virtue of the government's stock ownership and to be thereby entitled to the privileges and immunities of governmental entities.

Thus, the denial of the attributes of sovereignty in those cases turns, not so much on the participation of private interests, as it does on the government's apparent waiver of immunity, evidenced by its participation in a separate entity which may be reached without subjecting

government itself or property held in government's name to judicial processes. *Coale* v. *Societe Co-operative Suisse Des Charbons*, 21 F.2d 180, 181 (D.C. N.Y.); *United States* v. *Deutsches Kalisydikat Gesellschaft*, 31 F.2d 199, 202-203 (D.C. N.Y.). See also the *Planters' Bank* case, 22 U.S. 398, where the Court stated, "The suit is against a corporation, and the judgment is to be satisfied by the property of the corporation, and not that of the individual corporators." 22 U.S. at 399. Indeed, these same principles are operative even where government owns all the stock in the corporation. See *United States* v. *Strang*, 254 U.S 491, 493; *Panama Railway Co.* v. *Curran*, 256 Fed. 768, 771-772 (C.A. 5).

Obviously none of these precedents authorize the Board in the instant case to infer that the County has waived its express statutory immunity by entering into the trust agreement under which revenue bonds were issued to finance the County's purchase of the transit system. Even if the trust for revenue funds could be analogized to a corporation in which bondholders participate as shareholders with the County, by virtue of their right to receive interest and to enforce the covenants protecting the security of their investment, any waiver inferable from joint participation therein would be applicable only to proceedings against the trust, itself, which is certainly not an "employer" under the Act. Thus, it would be meaningless for the Board to issue an order directing the "trust" (which is simply a depository for the transit system revenues) to cease and desist from the unfair labor practices charged, to reinstate with backpay the transit employees alleged to have been discriminatorily terminated, or to bargain on request with the petitioner union. It is the County that holds title to the transit system assets; it is the County that possesses all the employer con-

trols; it is the County that petitioner seeks to reach by its unfair labor practice charges; and it is the County that is specifically exempted under Section 2 (2) of the Act. No amount of word play can change those facts.

For the same reasons, petitioner's case is not forwarded by the fact that Congress exempted "wholly owned" government corporations from the Act in 1947 and left within statutory coverage government "instrumentalities" and corporations in which government is only a partial shareholder. See also *N.L.R.B.* v. *Bank of America*, 130 F.2d 624, 627 (C.A. 9). The General Counsel's refusal to issue a complaint in the instant case is in no way inconsistent with a recognition that if the County had merely purchased some of the shares in Pawley's companies, those companies, in their exercise of the common law employer controls, would not be exempt under Section 2 (2) of the Act, simply by virtue of the County's partial ownership interest. On the contrary, the General Counsel's approach, unlike petitioner's, makes the statutory exemption turn on employer, rather than financial or operational controls.

Petitioner would apparently divest government of its statutory exemption immediately upon discovering the presence of private interests in the transaction. Thereafter, without regard to whether government or the private interests possessed the employer controls, it would order somebody, the "employing industry", or the "joint venture", perhaps, to remedy the violation found, leaving compliance to anyone with sufficient control to effect it.

A somewhat more precise method of determining statutory coverage has been developed over the years in the interpretation of the governmental exemption. In no case has government itself been ordered to comply with an unfair labor practice order, on the basis of "divestiture,"

or any other theory. On the contrary, the precedents evidence a consistent concern with whether government or private interests control the employer-employee relationship, predicated on the assumption that if these controls are vested in government alone, coverage is to be denied. On the other hand, if a private entity is shown to possess employer controls, either alone or jointly with government, coverage is established as to the private, but not as to the governmental, interests.

For example, in *Fruco Construction Co.* v. *McClelland*, 192 F.2d 241, 244-245 (C.A. 8), the United States entered into a cost-plus-fixed-fee contract with a private company for the construction of a small munitions plant. After operations started, it became obvious that guards were needed at the installation. At the instance of the Constructing Quartermaster, the private company entered into a subcontract with a detective agency for the guards, paying the agency 75 cents an hour for each guard. The next day, the arrangement was terminated by order of the Quartermaster who thereafter employed and supervised the guards. At first, the company paid the wages of the guards under this arrangement, but they were subsequently made civil service employees and taken off the company's payroll. Interpreting the employer exemption in the Fair Labor Standards Act, the court did not adopt the kind of approach urged by petitioner here—that is to say, it did not view the entire operation as an enterprise in which private interests participated, with resultant divestiture of the government's immunity. Instead, after a careful consideration of the various employer indicia, the court found the United States to be the employer of the guards and concluded that the statutory exemption applied to block an employee suit for overtime. See also, *Patton* v. *Roane-Anderson Co.*, 192 F.2d 965, 967 (C.A. 6);

Roane-Anderson, 95 NLRB 501; *Civilian Cafeteria Board,* 106 NLRB 208.

Further doubt is cast upon petitioner's divestiture theory by *Tampa Shipbuilding Co., Inc.,* 62 NLRB 954, where government, itself, was held to be exempted from the Act's coverage, even though, as petitioner acknowledges all ownership and operational controls were in the hands of private interests. In that case, a county sheriff supplied deputized guards to a private shipbuilder under a state statute authorizing the provision of such services to war industries, provided that the industries concerned reimbursed the sheriff for the cost of the guard services supplied. The Board stated (62 NLRB at 957):

> "The Company contends that the guards, as deputy sheriffs, are employees of the sheriff * * * and hence are not within the coverage of the Act. It apparently argues that, since the guards are employees of the sheriff by express provision of the State statute, they cannot simultaneously be employees of the Company. Significantly, however, the Florida Statute does not purport to declare that the guards are no longer to be considered employees of the Company. Indeed, although the statute explicitly makes the deputized guards employees of the sheriff, other provisions of the same statute obviously envisage a continuing degree of control over such guards to be exercised by the company whose premises are being guarded.
>
> "* * * Clearly, just as the control over the labor relations of a given group of employees may be shared by two private individuals, so it may be shared by a governmental agency and a private individual or company, as the [State] statute in the instant case apparently contemplates. The fact that Section 2 (2) of the Act excludes a political subdivision of a State from the definition of 'employer' cannot,

> as the Company inferentially argues, remove from the scope of the Act the private company which shares with the political subdivision control over the labor relations of the workers involved. * * * The single question to be resolved then is not, as contended by the Company, whether the guards became the employees of the sheriff * * * but whether the relationship of the guards to the Company * * * has continued to be that of employees within the meaning of the Act."

After analyzing the various employer controls still remaining with the Company, which were found to constitute it an employer under the Act, the Board concluded (*62 N.L.R.B. at 961*):

> "As already indicated the sheriff is excluded from the definition of the term 'employer' as defined in Section 2 (2) of the Act since he is a governmental agent. In making the finding herein * * *, the Board intends neither to encroach upon the prerogatives of the sheriff nor to redefine the relationship which exists between the sheriff and the guards. In the event that the Union wins the election ordered herein, the certification of it as the collective bargaining representative will be limited to those aspects of the labor relations of the guards which, the evidence indicates, are within the control of the Company."

A federal district court, which took an approach somewhat similar to the "joint venture" theory advanced by petitioner here was subsequently reversed by the First Circuit in *R.F.C.* v. *Merryfield*, 134 F.2d 988, 991-992. In that case, a shoe corporation borrowed $112,000 from the Reconstruction Finance Corporation and gave as security a mortgage on its real estate. The shoe corporation ceased manufacturing but continued to lease space in its building to other tenants, assigning all rents to R.F.C. A suspended credit account of the shoe corporation was set up in a federal reserve bank, under an agreement that all maintenance

expenses of the plant were to be paid from it and that the balance was to be used in payment of the principal and interest on the loan from R.F.C. The shoe corporation retained employer controls over the servicemen for the building.

The lower court held that R.F.C. was not entitled to the governmental exemption in Section 3 (d) of the Fair Labor Standards Act (which does not specifically exempt wholly owned government corporations), and concluded that R.F.C. was, therefore, subject to suit for overtime, along with the shoe corporation, if it was otherwise covered by the statute. On this issue, the lower court found that, although the employees worked for the shoe corporation, R.F.C. was so closely connected with the corporation through its financial aid, that it, thereby, became subject to the statute's provisions.

The First Circuit held, on the contrary, that only the shoe corporation was covered because it held the relevant employer controls. Reserving the question whether wholly government-owned corporations are entitled to the employer exemption in the FLSA, the court held that R.F.C. was, in any event, not covered by that statute, stating (134 F.2d at 991-992):

> "As we pointed out in the statement of facts, the District Court did not find specifically that R.F.C. was for the period in question an employer of appellees. The judgment against R.F.C. was based upon its financial interest in the affairs of the Shoe Corporation. Unless we determine that such an interest creates an employer-employee relationship or that the applicable sections of the Act bring R.F.C. within its purview as an employer we must reverse the District Court.
>
> * * *
>
> In the case before us the facts show that R.F.C. in order to protect its investment took an assignment of

> the rents from the Shoe Corporation and as part of that assignment an agreement was entered into by the parties whereby the maintenance expenses were to be deducted from the rents. This included the payment of wages to these appellees. As we have said, R.F.C. did not become an employer merely because it drew checks upon the suspended credit account to pay these employees. It was only the net rent which it received from the property which was deducted from the obligation of the Shoe Corporation. At most this was a bookkeeping transaction agreed upon to protect R.F.C. and to permit it to maintain close vigilance over the affairs of the Shoe Corporation. If the property produced no income R.F.C. would not have expended any further sums for the payment of the wages of these employees. The original loan of $112,000 is actually the only investment which R.F.C. made. All other transactions entered into by the parties were only to insure R.F.C. some return upon its investment."

See *Great Southern Chemical Corp.*, 96 NLRB 1013. See also *Cosmopolitan Shipping Co., Inc.*, 2 NLRB 759, 761-762, where the Board noted the existence of virtually all employer controls in the private entity and discounted the financial controls of the government. Similarly, the financial and operational limits placed on the County's operation of the transit system in the instant case serve as security for the bondholders' investment without interfering with the County's role as employer of the transit system's drivers.

Political subdivisions frequently acquire privately owned utilities, as the County did here, by the issuance of bonds, which create no lien on the credit and taxing power of the state, but are payable solely from the revenues to be derived through operation of the utilities acquired. *Farmington Township* v. *Warrenville State Bank*, 185 F.2d 260, 261 (C.A. 6); *People* v. *Chicago Transit Authority*, 392

Ill. 77, 64 N.E.2d 4, 8; *City of El Campo* v. *South Texas National Bank,* (Texas Civ. App.) 200 S.W.2d 252; *Interstate Power Co.* v. *Forest City,* 225 Iowa 490, 281 S.W. 207, 213; *Cawood* v. *Coleman,* 294 Ky. 858, 172 S.W.2d 548, 550; *Williams* v. *City of Barbourville,* (Ky. App.) 246 S.W.2d 591, 593; *15 McQuillin, Municipal Corporations* (Callagan & Co., 1950) §§ 43.11, 43.34, 43.131; *Rhyne,* Municipal Law (NIMLO, 1957) §§ 14-2, 14-7, 14-8, 14-9, 14-17, 23-7; *Bird,* Revenue Bonds (Haynes Foundation, 1941) p. 20; Fordham, Revenue Bond Sanctions, 42 Col. L. Rev. 395, 423-425; *Nehemkis,* The Public Authority, 47 Yale L.J. 14, 16-18.

Since the bondholders' investment is thus dependent solely on the continued earning of sufficient revenues, guarantees of economical and efficient operation are normally part of such transactions. *Rhyne,* Municipal Law (NIMLO, 1957) p. 337; Fordham, Revenue Bond Sanctions, 42 Col. L. Rev. 395, 423-425; *Nehemkis,* The Public Authority, 47 Yale L.J. 14, 16-18. See, *e.g., Farmington Township* v. *Warrenville State Bank,* 185 F.2d 260, 261 (C.A. 6). One commentator, *Bird,* Revenue Bonds (Haynes Foundation, 1941), pp. 20, 33-34, has stressed the importance of such covenants in the following terms:

> "It is * * * very important that the borrower be given the power to do all the things necessary for the success of the enterprise, including the making of covenants with bondholders respecting such matters as the use and disposition of funds, the maintenance of adequate reserves, proper upkeep and repairs, the carrying of insurance, the keeping and auditing of accounts, and the action which may be taken in the event of default.
>
> Such covenants, incorporated in the bond ordinance or resolution and made a part of the bond contract, can be useful in saving money for the project, protecting it from political interference, and helping to

insure its success. One important objective, of course, is to sell bonds at the lowest possible interest cost. In order to do this it is always necessary to keep in view the fact that the lender is not receiving a pledge of the full taxing power of the community, but is being offered solely the security of a business interprise. * * * The usual way of handling these safety provisions is to incorporate them in the bond resolution, but it may be done through a trust indenture. The latter involves the appointment of a trustee for the bondholders, whose responsibility is to see that their rights are safeguarded.

* * *

[The investor,] since his security lies in the financial success of the undertaking, * * * wants assurance that it will receive businesslike management. * * * [He] is * * * concerned that the bond funds be properly expended, that construction be carefully inspected, that the plant and equipment be well kept up * * *, that the rate structure be designed to make and keep the project self-supporting, and that adequate financial safeguards be set up to prevent revenues from being ruthlessly diverted and to assure the maintenance of adequate working capital and reserves.

Since these items are among the fundamentals of good management, the bondholders and the local citizens have a mutual interest in their realization. * * * All too frequently * * * the best of managers finds himself handicapped by loosely drawn provisions of the municipal charter, schemes of politicians to rob the enterprise, and even the machinations of persons who would like to see it discredited.

The bonds can be given more attraction for investment, and at the same time high standards of management given more protection, by entering into contractual pledges with the bondholders to maintain these standards."

Thus, the covenants in the trust agreement entered into by the County in the instant case are perfectly consistent with its ownership of the transit assets, its possession of the employer controls, and its right to the statutory exemption. Petitioner relies heavily on the functions of the consulting engineers under the trust agreement to defeat the County's statutory exemption. These functions, however, serve the interests of the County and its citizens as well as those of the bondholders.

See *Bird*, Revenue Bonds (Haynes Foundation, 1941), p. 30:

> "Any new project or extensive improvement of an old one calls for the services of a consulting engineer or engineers. No matter how experienced a municipality's engineering staff may be, it is not necessarily specialized in all the phases of planning a new project and its financing. In any event, the public officials, the prospective consumers, and the chief engineer himself need the protection which comes from the independent checking and advice of a competent outside consultant.
>
> A consulting engineer is indispensable for still another reason. It is largely through his independent work and reports that a favorable market can be found for the bonds. * * * Thus, the municipality has something to gain and nothing to lose by selecting a consultant with an established reputation for sound engineering ability and independence of opinion."

Although petitioner refers to the consulting engineers as Pawley's "agent-trustees", it offers nothing to justify this reflection on their independence and impartiality—a reflection of a rather serious nature since the County's purchase of Pawley's companies was predicted on a supposedly objective report of the consulting engineers, made at the request of the County's Transit Authority. More-

over, the trust agreement itself recognizes the independence of the consulting engineers and the very real possibility that their recommendations will not always meet with the approval of the bondholders.

Nor is there merit to petitioner's contention that Pawley may "recapture title and possession whenever the County fails to perform any of its obligations under the [trust] agreement". On February 9, 1962, Pawley relinquished full ownership of the transit system and its assets to the County. He was, thereafter, remitted solely to the rights of a bondholder. The bonds issued entitled Pawley, together with the other bondholders, to a first lien on the transit revenues for payment of the bond principal plus interest. The bonds are not, however, to be "construed * * * as conveying or mortgaging the Transit System or any part thereof". Thus, like most holders of revenue bonds, the bondholders here have only a pledge of revenues to secure their investment and lack the right to force foreclosure of the transit system upon default. Moreover, Pawley could, in any event, have no right to "repossession" of the transit system, for this would authorize him to pull the security out from under the other bondholders' investment, in complete derogation of the obligations established in the trust agreement.

Equally untenable, is the suggestion that the County's purchase of the transit system was part of an elaborate scheme to lend the County's statutory immunity to Pawley's companies. Clearly, from the County's point of view, the purpose of the transaction was to acquire a transit system. To be sure, the parties were aware of the exemption for governmental employers under Section 2 (2) of the Act; and probably, they regarded it as an advantage—as they did the other attributes of County operation and ownership. Thus, the consulting engineers, in their

reports to the County on the projected acquisition of the transit companies, commented on the rosy prospects raised by the elimination of: (1) franchise payments; (2) unemployment compensation; (3) certain taxes on real and personal property, diesel fuel and gasoline, and capital stock; (4) mileage payments; and (5) bus inspection costs. The reports also speak with favor of the freedom from state regulation, and the advantages of unified operation under county ownership. But recognition of these advantages, which is always present, does not make their realization improper. See *State* v. *Dade County*, discussed *supra*; Fordham, Revenue Bond Sanctions, 42 Col. L. Rev. 395, 431. Nor did awareness of the exemption in Section 2 (2) of the Act transform the purchase and sale of the transit system into a "conspiracy * * * to divest bus employees and the Union of their federal statutory right to bargain collectively".

In its effort to defeat the statutory exemption here, petitioner also relies on cases involving government seizure of private industry during the course of labor disputes. The difference between government's transient and disinterested control of industry in those cases and the lasting and significant interest of the County in the operation of the transit system here is obvious on its face (Cf. *N.L.R.B.* v. *Bachelder*, 120 F.2d 574 (C.A. 7), cert. denied 314 U.S. 647, where the receiver of a corporation was found subject to the Act). Moreover, in *United States* v. *U. M. W.*, 330 U.S. 258, even though government control of the mines was only temporary, and even though the Regulations for Operation of the Mines provided that none of the earnings or liabilities resulting from operation of the mines, while under seizure, were chargeable or payable to the Government, that the companies continued to be liable to suit and for taxes, and that the regulations should

not be construed as recognizing the companies' employees as employees of the Federal Government, nonetheless the Court found an implied exemption in the Norris-LaGuardia Act permitting the courts to restrain strikes by these "government" employees, 330 U.S. at 285, 288. Under these circumstances, petitioner can derive scant comfort from the statement in the concurring opinion of Justices Black and Douglas, that absent "ultimate control" of the government, evidenced by a right to remove the private managers who were still running the operation, no exemption would be inferred in the prohibitions of Norris-LaGuardia. 330 U.S. at 329.

Finally, petitioner urges that as policy considerations militate toward a broad construction of "state action" under the Fourteenth Amendment, so, conversely, the policy in favor of collective bargaining militates toward a narrow reading of the state's exemption under Section 2(2) of the Act. This contention ignores the countervailing policy considerations supporting the exemption of government as employer—policy considerations that led to congressional enactment of Section 2 (2) of the Act even though the effect of this enactment was to deny collective bargaining rights to a substantial group of employees. Arguments in favor of repudiating this policy can properly be addressed only to Congress. See *Creekmore* v. *Public Belt R.R. Comm. of New Orleans*, 134 F.2d 567, 577-578 (C.A. 5).

The labor relations of employees working under the direct supervision and full control of a county government in connection with the operation of a bus transportation system, which the County purchased by means of revenue bonds payable solely from net revenues derived from the County's operation, payment of which revenue bonds are secured by a trust indenture between the County and corporate bank trustees guaranteeing to all revenue bondhold-

ers that the system will be efficiently operated by the County, are not subject to coverage of the federal labor statutes, but are governed by state law.

A proper interpretation of the contract documents here involved clearly refutes any notion that this transaction presents any unique or important question of federal law. The state courts, federal courts, and the General Counsel correctly recognized and applied the controlling precedents.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari have been mailed by airmail, postage prepaid, this 10th day of December, 1964, to the following:

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